

THE HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

vs.

INTERNAL REVENUE SERVICE,

Defendant.

NO. 2:15-cv-00369-RSM

**SECOND MOTION FOR EXTENSION
OF TIME TO FILE DEFENDANT'S
REPLY IN FURTHER SUPPORT OF
ITS MOTION FOR SUMMARY
JUDGMENT**

NOTE ON MOTION CALENDAR:
August 9, 2022

MICROSOFT CORPORATION,

Plaintiff,

vs.

INTERNAL REVENUE SERVICE,

Defendant.

NO. 2:15-cv-00850-RSM

Defendant IRS moves for an additional 17-day extension of time, through August 29, 2022, to reply in support of its Motion for Summary Judgment. The IRS needs more time to investigate and address the issues of law and fact raised by Plaintiff's Brief in Opposition, requiring at least one supplemental declaration to clarify the facts underlying the IRS's search and/or exemption assertions.

While undersigned counsel can address the issues of law, many of the facts underlying Plaintiff's numerous challenges require undersigned counsel's consultation with the IRS Chief Counsel witnesses in this matter. These witnesses have knowledge on how the search was conducted and what other stakeholders or additional documents need to be consulted—for instance, to address Plaintiff's allegations that the IRS found former employee Samuel Maruca's hard drive to be unreliable, or that the IRS failed to search the ESI of Gary Gray. Further consultation with other IRS stakeholders who have more familiarity with the IRS's dealings with Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn") may also be necessary. Moreover, at least three IRS Chief Counsel attorneys are in training most of this week and their availability is limited. *See infra* ¶¶ 16, 20, 21 (for additional details pertaining to the reasons the IRS needs additional time as to the search).

Plaintiff also raises a number of challenges to the IRS's *Vaughn* index and exemption assertions. While undersigned counsel is able to address such challenges legally at a high level, there are facts underlying the challenges that again require consultation with IRS Chief Counsel witnesses who have knowledge about both the assertions and the context of each withheld or redacted document, as well as others who have first-hand knowledge about the summons enforcement proceedings before this Court. For example, Plaintiff has alleged that, with respect to its assertion of attorney-client privilege, the IRS made prior statements to the Court in summons enforcement proceedings¹ that are inconsistent with its current position. Plaintiff has also alleged that the IRS improperly withheld routine audit documents under work-product protection. Given the number of documents potentially at issue and the nature and extent of Plaintiff's challenges, additional time is needed to evaluate Plaintiff's Brief in Opposition and prepare a reply.

In support of this request, the IRS states the following:

1. On April 29, 2022, Defendant filed a Motion for Summary Judgment ("Defendant's Motion" or "Motion") and supporting papers, totaling 850 pages. *See* Doc. 63. The earliest noting

¹ The prior summons enforcement proceeding was not litigated by undersigned counsel but special litigation counsel in the Department of Justice, Tax Division.

1 date for the motion was May 27, 2022, but in an attempt provide Plaintiff with sufficient time to
2 respond given the numerous document pages withheld in part and in full, undersigned counsel set
3 the noting date one month later, for June 27, 2022.

4 2. On May 12, 2022, the parties stipulated to an extension of time of 32 days for Plaintiff
5 to “fully evaluate Defendant’s Motion, declarations, and exhibits (including its *Vaughn* index) to
6 prepare its response.” Doc. 64 ¶ 6. In requesting the extension, the parties asserted that “Defendant’s
7 motion presents complex issues of fact and law regarding Defendant’s search efforts and exemptions
8 claims.” *Id.* ¶ 4. Because Defendant did not know then precisely what Plaintiff would be challenging,
9 Defendant did not contemporaneously request an extension of time to reply, but noted that it intended
10 to make such a request following the filing of Plaintiff’s Brief in Opposition to have a better estimate
11 of time needed to prepare its reply and to ensure that such a request would be made only once. *Id.* at
12 2 n.1.

13 3. The Court granted the request and extended the deadline for Plaintiff to file its
14 response through July 22, 2022. Doc. 64. Plaintiff thus had 85 days to file its Brief in Opposition.

15 4. On July 22, 2022, Plaintiff filed its brief in opposition and supporting papers, totaling
16 over 2,100 pages, more than twice the number of pages Defendant filed. Docs. 68 & 69.

17 5. Plaintiff challenged the adequacy of Defendant’s search, arguing: (a) that the agency
18 was required to search for responsive records in contractors’ possession, Doc. 68 at 7–13; (b) that
19 Defendant’s declarations inadequately described the agency’s search process, *id.* at 13–14; and
20 (c) that Defendant employed an inexplicably inconsistent search methodology, *id.* at 14–16. Among
21 other things, Plaintiff alleged that Defendant selectively searched departed employees’ ESI and
22 disaster recovery tapes, *id.* at 14–16, and that Defendant collected but did not review any ESI from
23 Gary Gray, who allegedly played a material role in the Microsoft summons enforcement process, *id.*
24 at 16.

6. Plaintiff also argued that Defendant's *Vaughn* index is inadequate as a matter of law because it does not provide sufficient information to evaluate the merits of Defendant's claimed exemptions. *Id.* at 16–19 (arguing, among other things: that the *Vaughn* index includes over 500 repetitive and non-descriptive entries; that over roughly 250 entries lack fundamental information such as author or recipient; and that the index did not include entries for several pages with redactions).

7. Plaintiff additionally argued that Defendant redacted without basis allegedly non-responsive information and that Defendant failed to produce records it stated it would. *Id.* at 19 (identifying roughly 570 entries).

8. Plaintiff further challenged Defendant's exemption claims, including those under 5 U.S.C. §§ 552(b)(2), (b)(3), (b)(4), (b)(5) (specifically its claims under the deliberative process privilege, the attorney-client privilege, and the work product doctrine), (b)(6), and (b)(7)(A). *Id.* at 19–32. In support, Plaintiff cites or indirectly relies on at least 12 exhibits identifying over 5,200 entries² in Defendant's *Vaughn* index. *Id.* (citing Exs. 12 (identifying 3 entries), 13 (identifying over 2,300 entries), 14 (identifying 11 entries), 15 (identifying roughly 80 entries), 16 (identifying roughly 30 entries), 17 (identifying roughly 50 entries), 19 (identifying roughly 190 entries), 20 (identifying over 2,300 entries), 25 (identifying 24 entries), 26 (identifying 149 entries), 27 (identifying 56 entries), 28 (identifying 56 entries).

9. On July 22, 2022, Plaintiff also filed a Brief in Opposition (totaling over 2,700 pages) in the parties' related FOIA matter. *See* Dkt. 2:15-cv-01605-RSM, Docs. 56 & 57.

10. On July 28, 2022, the parties tried to stipulate to an extension of time of 45 days for Defendant to file its Reply brief in support of its Motion for Summary Judgment based on many of the same reasons provided in the parties' May 12, 2022 request. Doc. 71. The parties also stated that

² Many of these entries overlap, as multiple exemption claims are often made per document.

1 the IRS Chief Counsel attorney assigned to the matter (and the agency person with most access to
2 the evidentiary facts) would be on leave the week of August 1, 2022.

3 11. On July 29, 2022, the Court granted in part Defendant's request. Doc. 72. The Court
4 stated that the parties had given only surface-level, conclusory reasons for this request, and noted
5 that the IRS had had an opportunity to raise this issue when the parties stipulated to the last set of
6 deadlines extending Plaintiff's response deadline to July 22, 2022. *Id.* at 2. However, the Court
7 recognized that the breadth of Plaintiff's Brief in Opposition was clear on the face of the filing,
8 justifying more than the standard week to draft a reply brief, and gave Defendant until August 12,
9 2022 to do so.

10 12. As explained above, Defendant did not stipulate to an extension of its reply deadline
11 when it agreed to extend Plaintiff's response deadline to July 22, 2022 because it did not want to
12 request an extension without knowing precisely what Plaintiff would be challenging, which would
13 affect the time needed.

14 13. Plaintiff's Brief in Opposition is broad, and challenges the adequacy of Defendant's
15 search, a substantial portion of Defendant's exemption claims, and the sufficiency of Defendant's
16 *Vaughn* index.

17 14. The IRS needs more time to investigate several issues raised by Plaintiff, including
18 the allegations that over roughly 250 entries in the *Vaughn* index lack fundamental information such
19 as author or recipient; that the index did not include entries for several pages with redactions; and
20 that Defendant failed to produce records it stated it would.

21 15. Given the nature and extent of Plaintiff's claims, particularly its complaint that
22 Defendant's supporting declarations and *Vaughn* index lack sufficient detail, more time is also
23 needed to determine to obtain at least one supplemental declaration from an IRS Chief Counsel
24 witness.

1 16. Jamie Hartford and Christopher Valvardi are the IRS Chief Counsel witnesses who
2 submitted search declarations in this matter. These witnesses have knowledge on how the search was
3 conducted and what other stakeholders or additional documents need to be consulted—for instance,
4 to address Plaintiff’s allegations that the IRS found Samuel Maruca’s hard drive to be unreliable, or
5 that the IRS failed to search the ESI of Gary Gray.

6 17. Moreover, Plaintiff’s argument that the agency was required to search for responsive
7 records in contractors’ possession, for which it devoted six pages in its Brief in Opposition, is a
8 complex issue of law and fact that requires more time to evaluate and address. Plaintiff, among other
9 things, argues that the IRS had constructive control over Quinn Emanuel’s records based on certain
10 factual allegations, and addressing this latter contention factually may require further consultation
11 with other IRS stakeholders who have more familiarity with the agency’s dealings with Quinn,
12 particularly IRS Program Manager Walter Choi and IRS Chief Counsel attorney Cathy Goodson.

13 18. As for Plaintiff’s broad challenge to a substantial portion of Defendant’s exemption
14 claims, more time is also needed to review those challenges and whether they need to be addressed
15 at a more detailed level. For example, Plaintiff has alleged that, with respect to its assertion of
16 attorney-client privilege, the IRS made prior statements to the Court in summons enforcement
17 proceedings that are inconsistent with its current position. Plaintiff has also alleged that the IRS
18 improperly withheld routine audit documents under work-product protection. While undersigned
19 counsel is able to address Plaintiff’s challenges legally at a high level, there are facts underlying the
20 challenges that similarly require consultation with IRS Chief Counsel witnesses, such as Mr. Choi
21 or Ms. Goodson, who have knowledge about both the assertions and the context of each withheld or
22 redacted document (of which there are tens of thousands of pages), as well as the summons
23 enforcement proceedings before this Court.

1 19. Mr. Valvardi is also the witness here who has knowledge about both the assertions
2 and the context of each withheld or redacted document, because he reviewed all the records withheld
3 in full and in part in this case while creating Defendant's *Vaughn* index.

4 20. Mr. Valvardi is also the IRS Chief Counsel line attorney assigned to this matter, and
5 undersigned counsel's main point of contact with the IRS. His involvement has been critical in the
6 defense of these consolidated cases, and he is the individual with both the knowledge of who at the
7 IRS has relevant information to respond to Plaintiff's challenges and the knowledge of the intricacies
8 of these cases, which has involved tens of thousands of pages of documents.

9 21. Mr. Valvardi was on leave the week of August 1, 2022, and both he, Mr. Hartford,
10 and Ms. Goodson are participating in annual IRS Chief Counsel CLE training from 12:30 to 4:00
11 p.m. on August 9, 2022, August 10, 2022, and August 11, 2022. Attendance at this training is
12 mandatory for Mr. Hartford and Ms. Goodson.

13 22. As set forth above, good cause exists for another extension of time. An extension of
14 time would permit, among other things: (a) Defendant to investigate the issues raised by Plaintiff it
15 was not previously aware of; (b) undersigned counsel to consult with the IRS Chief Counsel
16 witnesses who have the most comprehensive knowledge of the facts regarding agency's search and
17 exemption assertions; (c) IRS Chief Counsel witnesses and attorneys to consult any other
18 stakeholders with knowledge or additional documents; and (d) undersigned counsel to obtain at least
19 one additional supplemental declaration to clarify facts underlying the IRS's search or exemption
20 claims.

21 23. Accordingly, Defendant requests that the Court extend the deadline for Defendant to
22 reply an additional 17 days, through August 29, 2022 (or a total of 38 days from Plaintiff's July 22,
23 2022 Brief in Opposition).

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1 DATED this 9th day of August, 2022.

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3 **U.S. DEPARTMENT OF JUSTICE**

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this SECOND MOTION FOR
EXTENSION OF TIME via the Court's electronic case filing system on August 9, 2022.

/s Stephen S. Ho
STEPHEN S. HO